

4 April 2024

Submission to Financial Services Regulatory Framework in Relation to Financial Abuse

My mother was a quiet, hard-working, selfless person who in her long career in the public service worked for multiple departments including the various iterations of the federal Department of Health, Housing and Community Services and, in later years, the WA Police Department in an administrative role. [REDACTED]
[REDACTED]

In June 2013 my mother suffered a stroke and as she was unable to manage her own affairs, my sister sought administration orders. That sister was chosen by the family as she was the only one of mum's four children living in Perth (my two other sisters lived interstate and at the time I lived overseas) and she was a business professional who should have been capable of managing my mother's affairs.

My sister was appointed Plenary Administrator by the State Administrative Tribunal (the Tribunal) in July 2013, with the orders renewed in October 2013 and again in April 2014. In July 2015 the Tribunal removed my sister and appointed my mother's sister as Plenary Administrator.

My mother died in November 2019 and, now back in Australia, I was appointed administrator of the estate. As part of my duties I have been looking into my mother's finances and some anomalies dating back to my sister's period as administrator. I discovered:

- Year 1, 23 July 2013 to 22 July 2014 - during this period my sister was able to transfer \$47,784.33 from my mother's account to her personal accounts and \$15,367.23 in debit, credit card and online purchases that most likely were not to the benefit of my mother.
- Year 2, 23 July 2014 to 27 July 2015 - during this period my sister was able to transfer \$22,250.00 from my mother's account to her personal accounts and \$2,799.53 in debit, credit card and online purchases that most likely were not to the benefit of my mother.

This was just from my mother's main bank. If I was able to more fully review her credit cards and accounts with other banks, we could be talking an additional \$50,000 in transactions that would not have been to the benefit of my mother.

It was the administration orders granting my sister authority over my mother's financial affairs that allowed this financial abuse. There are two bodies relevant to the administration orders, the WA State Administrative Tribunal (the Tribunal) and the WA Public Trustee (the Trustee) and the relevant act is the WA Guardianship and Administration Act 1990 (the Act).

The Act does have some provisions to protect the represented person:

70 . Administrator to act in best interests of represented person

(1) An administrator shall act according to his opinion of the best interests of the represented person.

(2) Without limiting the generality of subsection (1), an administrator acts in the best interests of a represented person if he acts as far as possible —

(a) as an advocate for the represented person in relation to the estate;

- (b) in such a way as to encourage the represented person to live in the general community and participate as much as possible in the life of the community;*
 - (c) in such a way as to encourage and assist the represented person to become capable of caring for himself and of making reasonable judgments in respect of matters relating to his person;*
 - (d) in such a way as to protect the represented person from financial neglect, abuse or exploitation;*
 - (e) in consultation with the represented person, taking into account, as far as possible, the wishes of that person as expressed, in whatever manner, or as gathered from the person's previous actions;*
 - (f) in the manner that is least restrictive of the rights, while consistent with the proper protection, of the represented person;*
 - (g) in such a way as to maintain any supportive relationships the represented person has; and*
 - (h) in such a way as to maintain the represented person's familiar cultural, linguistic and religious environment.*
- (3) Nothing in subsection (2)(a) shall be read as authorising an administrator to act contrary to the Legal Profession Act 2008 .*
- (4) Nothing in subsection (2) shall be read as restricting the functions of an administrator at common law or under any written law.*

Under s.80 of the Act, the administrator is required to submit accounts to the Public Trustee annually.

80 . Accounts

- (1) An administrator shall submit accounts to the Public Trustee as required by, or prescribed by regulations, except so far as the administrator is exempted from doing so by the Public Trustee.*
- (2) When a sole administrator of the estate of a represented person dies, a person having possession of any books, papers or documents relating to that estate shall deliver them to the Public Trustee.*
- (3) The Public Trustee shall examine any accounts lodged under subsection (1) or delivered under subsection (2) and may —*
 - (a) allow them;*
 - (b) disallow any amount paid;*
 - (c) determine that any amount or asset has been omitted, or that any loss has occurred.*
- (4) Where the Public Trustee —*
 - (a) disallows an amount paid or determines that an amount or asset has been omitted or that any loss has occurred; and*
 - (b) determines that there has thereby been a loss to or diminution of the estate, the administrator is liable to the estate for such loss or diminution, except to the extent that the Public Trustee relieves him of liability.*
- (5) Accounts that have been examined under this section and allowed by the Public Trustee are conclusive unless the administrator acted dishonestly, in bad faith or without reasonable cause.*
- (6) The Public Trustee shall issue a certificate as to any loss or diminution for which an administrator or his estate is liable under subsection (4), taking into account any relief allowed by the Public Trustee under that subsection, and the Public Trustee may recover the same from the administrator or his estate for the benefit or the estate of the represented person as a debt due in a court of competent jurisdiction.*
- (6a) A person aggrieved by a decision of the Public Trustee under subsection (3) may apply to the State Administrative Tribunal for a review of the decision.*
- (7) This section does not apply to the Public Trustee in the Public Trustee's capacity as an administrator.*

These protections, especially the S. 70 protections, appear to be of no practical use in protecting the represented person as there is little or no oversight to ensure the administrator acts in accordance with this section of the Act.

After seeking access from the State Administrative Tribunal and the Public Trustee, it was brought to my attention that, contrary to section 80, annual accounts were never submitted by my sister.

The following response was received from the Public Trustee:

“As you can see the onus is on the Private Administrator to lodge annual accounts to the Public Trustee. The Public does have a process when accounts is not lodged and it is to make several contacts with the administrator to request for the annual accounts (and sometimes) other information to be lodged. If after several requests which eventually involves a letter through registered mail then it is standard practice for the Public Trustee to make an application with the State Administrative Tribunal so that the suitability of the Administrator can be assessed by the Tribunal and a new administrator possibly appointed. Please note that the lodgement of the account is required 1 year and one month after the date of the appointment of the administrator and that, there is then a time needed for the Public Trustee to make reasonable requests to lodge accounts and eventually a time for the Tribunal to list the review hearing (following the application from the Public Trustee) to assess the suitability of the administrator. As you can now understand this is therefore, unfortunately, not unusual that 1.5-2 years have passed before an administration order is revoked and a new administrator appointed.

Following the revocation of an administrator the Public Trustee generally makes the request to lodge a final account but eventually if the administrator is not corresponding with us then in most cases the Public Trustee has no other choice but to close its file.

As a consequence, of the above the Public Trustee is unable to review an annual account if it has never been lodged by the Private Administrator.”

And further:

“On 6 November 2014 my office initiated a s86(1) of the GAA Act application for a Tribunal review of the suitability of Ms XXX as administrator because she had not lodged the required Forms B&C (Account 1) by 30 October 2014.

On 11 November 2014 my office lodged the s86(1) application.

On 9 January 2015 the Tribunal held a s86(1) hearing and adjourned.

On 18 March 2015 the Tribunal held a s86(1) hearing and adjourned.

On 27 July 2015 the Tribunal held the s86(1) hearing, revoked [REDACTED] as administrator, and appointed [REDACTED] as administrator.”

At no stage did the Public Trustee or State Administrative Tribunal notify myself, or as far as I'm aware the rest of the family, that my sister had failed in her duty to submit accounts. I was only made aware of this in July, 2021 after I made enquiries with the Tribunal and the Public Trustee. If I had been made aware in 2014, I could have done something to protect the rest of my mother's estate.

Based on my understanding of the administration process and my experience handling my mother's estate, there appears to be no real oversight of administration orders and the whole process is open to abuse and fraud.

As part of the appointment process, the administrator is required to lodge a Form A which sets out information about the represented person including income, bank accounts and other financial information. There is, however, no connection between the information from the Form A and the administration orders. It is therefore very simple for the administrator to deliberately omit bank accounts and assets from the Form A and then, once appointed, use the order to gain access to those assets and bank accounts with no possibility of oversight from the Tribunal, Public Trustee or other concerned family members.

It is possible in the above scenario that during my sister's period as administrator, she could have sold my mother's home, taken all of my mother's funds and left her destitute. It appears nothing would have stopped that occurring, not the banks, not the tribunal. It would then presumably be a matter for the police which, as we're talking family matters, a difficult decision and if the administrator had spent all the stolen funds, the chance for financial compensation would be limited.

As part of managing the estate I looked at a variety of sources for guidance and assistance on my mother's administration orders. I was met with limited success. Responses from various parties:

- **Financial Institutions** - "(Bank) would expect that the Tribunal weighed up all factors in appointing the administrator and therefore we would not necessarily have a concern around the administrators actions or intentions on the accounts".

and

"State tribunals grant financial administration rights to Financial Managers directly, the bank has no involvement in this process. The bank can only act upon instructions received from the Financial Manager as the bank is not notified of any changes from the Tribunal.

Many Financial Management Orders (FMO) contain a review date, this is for the Tribunal's own administrative purposes only and has no effect on the FMO. All FMOs remain in place and valid until revoked by the Tribunal, unless there is an expiry date listed.

In this case, the order provided did not have an expiry date and continued until we received a new Order confirming new appointment or revocation. Thus, any claims of unauthorised transactions by the financial manager under a valid FMO will need to be raised to the issuing state tribunal."

- **AFCA** - "The transactions are more appropriately dealt with by the WA state administrative tribunal because the information from the Bank shows that there was an order in place during these dates. The concerns about transactions between this period are to be directed and dealt with by the WA state administrative tribunal as it appears there were valid orders during this time. The concerns raised about whether the Bank's actions were in accordance with a valid order are also something that would be more appropriately considered by the WA state administrative tribunal."

- **ABA** - The Banking Code 2019 does not specifically refer to Administrator orders.

The ABA does, however, publish the Industry Guideline: 'Responding to requests from a power of attorney or court-appointed administrator'

(<https://www.ausbanking.org.au/wp-content/uploads/2020/11/Banking-Industry-Guideline-Power-of-Attorney.pdf>)

The Guidelines are not legally binding and contain mostly general guidelines such as to: "Record the extent, duration and limitations to the attorney or administrator's power (time period, authorities, conditions or restrictions, and specified instructions)" and notes: "Allowing an attorney to exceed their authority may have legal implications for both the attorney and potentially the bank if it has done so knowingly."

- **Australian Guardianship and Administration Council (AGAC)** - as far as I am aware AGAC has no information on guidelines for financial institutions with respect to administrator orders

Recommendations

1. Administration orders - the orders which grant the administrator authority, should be made more specific and refer to the Form A. For example, if the Form A lists only a transaction account with Bank A and a mortgage and transaction account with Bank B, then the order should be specifically limited to those accounts and banks. The same should apply to high-value assets such as cars, houses, insurance policies and superannuation. Should the administrator discover additional accounts or assets, or wish to open a new account or purchase a new asset, the administrator would need to submit a revised Form A and the tribunal issue a new order to include the new account or asset.

Outcome: this would reduce the possibility of the administrator hiding accounts or assets from the Tribunal/Trustee.

2. Financial reporting - when an administration order is first issued, the Form B & C account forms should be required to be submitted after 3 months. Once the accounts have been submitted and approved, it would be reasonable to revert to the existing one year reporting schedule. If at any stage the financial reports are not submitted within a reasonable period, say 1 month, then the Tribunal should intervene and, where there is no valid reason for not filing the reports, the administrator should be removed.

Outcome: this would allow earlier identification of administrators who are unable to manage the financial affairs.

3. Family oversight - the Tribunal seeks input from concerned family of the represented person when deciding on the administrator and also sends copies of orders to those family members. The Tribunal and the Trustee should do more in this regard and provide copies of all forms submitted to the family members and also provide prompt notification should the administrator fail in their reporting or other duties.

Outcome: this would allow the family members of the represented person to have some oversight of the administrator. As it currently stands the family have limited scope to oversee

matters and need to make a submission to the Tribunal which is generally not possible if the family are not aware of any wrongdoing.

These matters may relate specifically to the situation in Western Australia, however a cursory view of the situation of administration/financial management orders in other states indicates that the protections are limited in other states. A federal review may be necessary.

I thank you for reading this far and although I know there is no chance that my one complaint will result in a change in existing laws or protections for represented persons, I hope that it will play some small part in a review of state and federal protections.

Regards